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No. 81-2155

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DUDLEY J. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Petitioners,

vs.

GARY D. SMIDDY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. TALCOTT
TALCOTT, VANDEVELDE & WOEHRLE
727 West Seventh Street
Suite 430
Los Angeles, California 90017
(213) 622-4750

Counsel of Record for Respondent

JOHN H. BISBEE
BISBEE & NAGAN
137 North Lafayette Street
Macomb, Illinois 61455
(309) 833-1787

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a claim based upon a plaintiff's warrantless arrest and detention without probable cause is cognizable under 42 U.S.C. §1983 regardless of the defendant's intent in causing the unlawful arrest and detention and regardless of the possible availability of alternative state remedies.

2. Whether the trial court's instructions to the jury on the issues of probable cause and good faith immunity properly reflected well-settled law regarding the jury's role in deciding disputed questions of reasonableness in federal civil rights actions.

3. Whether this Court should review the principle, uniformly accepted and applied by each of the various circuits, that an appellate court may remand a case for a partial retrial on the distinct and separable issue of damages where the issues concerning liability have been fairly litigated and properly determined.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, Gary D. Smiddy, respectfully opposes the Petition for Writ of Certiorai filed herein seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit issued on August 7, 1981 and amended on December 21, 1981.

STATEMENT OF THE CASE

On November 15, 1973, the respondent, Gary D. Smiddy, was arrested without a warrant at the direction of the petitioners Dudley Varney and Sidney Nuckles. Varney and Nuckles were officers of the Los Angeles Police Department who had been responsible for investigating the murder of a young woman, Linda Miller, whose body had been discovered on the morning of October 19, 1973.

The day after his arrest, a polygraph examination was administered to Smiddy by the petitioner Raymond Inglin, a Los Angeles Police Department examiner, following an agreement by the police that Smiddy would be released if he passed the test. Inglin concluded that Smiddy's responses on the examination were deceptive; he so advised Varney and Nuckles who then continued to hold the respondent in custody.

A criminal complaint was subsequently filed against Smiddy charging him with the murder of Linda Miller. The respondent was continuously incarcerated until December 15, 1973, when he was released on bond. On January 23, 1974, the complaint against him was dismissed in the Los Angeles County Superior Court pursuant to Cal. Penal Code §995 on the grounds that Smiddy "had been committed without reasonable or probable cause."

In October, 1976, Gary Smiddy filed the instant case under the provisions of 42 U.S.C. §1983 asserting that the actions of the petitioners had caused him to be deprived of his federal constitutional rights.[1/] Specifically, the respondent claimed that his arrest and detention had been

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1/ Prior to filing this federal suit, Smiddy submitted a claim based on the same facts to the City of Los Angeles pursuant to the California Tort Claims Act, Cal. Govt. Code §814, et seq. The respondent was unsuccessful in his efforts to find counsel to represent him in a false arrest action under that Act. [Reporter's Transcript (hereafter R.T.) 2471, 2568].

effected without probable cause, in violation of his rights under the Fourth Amendment as applied to the states through the Fourteenth Amendment.

A lengthy jury trial was conducted in the district court. The evidence presented by both sides to the case centered on the course of the petitioners' investigation leading to the respondent's arrest, detention and prosecution. With some notable exceptions,[2/] the evidence regarding the

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2/ For example, a significant conflict in the evidence arose when the petitioner Varney testified at trial that he had received information that a traffic officer responsible for ticketing illegally parked vehicles near the murder scene was a lazy worker who did not diligently patrol his assigned areas. [R. T. 976]. This testimony was offered to counter an important point regarding the reasonableness of the petitioners' conclusion that Smiddy had the opportunity to kill Linda Miller. In rebuttal, the respondent offered the testimony of the claimed source of Varney's information to the effect that he had never had such a conversation with Varney and that, in fact, the traffic officer in question was very conscientious in the performance of his duties. [R. T. 1637-38]. A similar dispute in the evidence concerned petitioners' testimony, offered in explanation of their failure to investigate an alternative murder suspect, that the individual in question was a "quiet, little guy" [R. T. 749, 1274]. The respondent produced testimony that the individual was a strong, well-built, six-foot-two. [R. T. 1286].

actions of the petitioners and the specific facts and items of information developed during their investigation was not disputed. The central controversy at trial concerned Smiddy's claim that the petitioners had so willfully distorted the facts and information available to them and had so recklessly and negligently conducted their investigation and examination procedures that they reached patently unjustified and unreasonable conclusions regarding the respondent's responsibility for the death of Linda Miller and, on the basis of those conclusions, caused the respondent to be arrested and detained without probable cause. A summary of the voluminous evidence and argument presented on these issues at trial is included in the opinion of the Court of Appeals set out in Appendix A to the Petition for Certiorari.

2/ (cont.)

The respondent argued at trial that these disputed points represented the kind of intentional distortion which characterized the petitioners' conduct throughout their investigation.

The jury returned a verdict finding the petitioners liable under §1983 and awarding the respondent damages in the sum of $250,000. The Court of Appeals for the Ninth Circuit affirmed the judgments of liability as to each of the petitioners, holding that the respondent had sufficiently established the absence of probable cause for his arrest and that the officers' "good faith" immunity defenses had been properly rejected by the jury. However, the court held that the petitioners should have been presumed to be immune from liability for any damages suffered by the respondent following the filing of the criminal complaint against him. The case was therefore remanded for a partial retrial to determine what portion of the respondent's damages were attributable to the period of time prior to the filing of the complaint.

SUMMARY OF ARGUMENT

I.

In Parrat v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), this Court held that a §1983 action alleging a deprivation of property without due process will not lie where state tort remedies provide a means of redress which satisfies the requirements of procedural due process. The petitioners' assertion that the instant case raises a substantial issue as to the scope of this Court's holding in Parrat is based on two fundamentally erroneous premises. First, petitioners inaccurately characterize this case as one involving "simple negligence." In fact, a substantial portion of the respondent's evidence and argument in the trial court concerned the intentional and reckless conduct of petitioners which resulted in respondent's unconstitutional arrest and incarceration, and no inference can be drawn that negligence was the sole basis for the jury's

finding of liability. Second, and more significantly, the petitioners fail to recognize that the instant case does not involve a bare due process claim such as that advanced in Parrat. Rather, it involves specific constitutional rights guaranteed by the Fourth Amendment that have been wholly incorporated within the Due Process Clause of the Fourteenth Amendment. The case law is well-established that state remedies need not be exhausted prior to pursuing such a §1983 action and that the federal remedy under §1983 for such deprivations supplements available state remedies. Thus, petitioners' argument that the instant case presents unanswered questions regarding the scope of this Court's holding in Parrat is without merit.

II.

The question of probable cause which arises in a §1983 action based on a claim of unlawful arrest and detention involves an evaluation of the reasonableness of police conduct in light of all the

surrounding facts and circumstances. Because of the nature of this inquiry, the courts have consistently held that the issue of probable cause in such an action should be decided by the jury unless the facts are undisputed and are not susceptible of differing inferences or interpretations. The petitioners' suggestion that the jury must be instructed in such a manner as to limit its function to finding the existence of specific facts while leaving the final probable cause determination to the court is contrary to this well-settled rule. Moreover, it is clear that any such instruction would have been inappropriate in this case because the central dispute involved the reasonableness of the petitioners' inferences and conclusions regarding probable cause rather than the existence of particular facts. Review by the Court on this issue is accordingly unwarranted.

III.

Federal appellate courts have consistently applied the principles enunciated in Gasoline Products Co. v. Champlin Refinery Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931) when determining whether a case should be partially or fully remanded for retrial. Case authority does not support petitioners' argument that the Gasoline Products standard has been subjected to disparate treatment among the circuits. Rather, the case law indicates that outcomes vary based upon the application of well-established standards to the particular circumstances and facts of each case. The limited remand in the instant case was clearly justified under such standards because the issue of the temporal apportionment of damages, the only basis upon which the judgment was reversed, is clearly distinct and separable from the settled issues of liability.

ARGUMENT

I

THE INSTANT CASE INVOLVING A §1983 CIVIL RIGHTS CLAIM BASED ON THE SPECIFIC CONSTITUTIONAL GUARANTEES OF THE FOURTH AMENDMENT DOES NOT POSE ANY ISSUE WARRANTING REVIEW BY THIS COURT

During its last term, this Court decided, with only a single partial dissent, the case of Parrat v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). That decision, which concerned a claim under 42 U.S.C. §1983 based on an alleged negligent deprivation of a prisoner's property, represented a logical and limited response to two difficult and recurring questions regarding the proper scope of §1983 litigation.

First, the Court in Parrat settled the question as to whether negligent conduct under color of state law could ever form the basis for liability under §1983, holding that nothing in the statute

requires a particular state of mind on the part of a defendant or precludes recovery where a defendant's negligence in fact deprives a plaintiff of some constitutional or statutory right. Id. at 534-535, 101 S.Ct. at 1912-1913. Secondly, the Court held that, with respect to a deprivation of property such as that alleged in the case before it, the defendant prison official's negligence did not represent a violation of constitutional proportions because the remedies afforded to the plaintiff by state law were sufficient to satisfy any Fourteenth Amendment due process interests implicated by the defendant's conduct or by the plaintiff's loss. Id. at 543-544, 101 S.Ct. at 1917. In so holding, the Court reasonably eliminated the possibility that every injury or deprivation of property, no matter how minimal or negligible, might become the subject of a federal civil rights action whenever a state official was involved.

The argument advanced by the petitioners here is that the instant case presents a substantial

issue regarding the scope of this Court's decision in Parrat as applied to cases involving the alleged negligent violation of due process rights. This argument is premised on two basic errors involving misinterpretation both of the nature of this case and of the fundamental analytical principles which underlie the Parrat decision.

First, the petitioners erroneously assume that the respondent's §1983 claim rested on an assertion of simple negligence by the petitioners in conducting the investigation and examination which led to Smiddy's arrest and incarceration. In fact, a substantial portion of the respondent's evidence and argument in the trial court concerned intentional and reckless conduct on the part of the petitioners involving the distortion and, in some instances, falsification of facts, a blatant disregard of basic fairness and professional standards, and a wilful indifference to Smiddy's rights and interests. As the petitioners recognize, at the time this case was decided the law in the Ninth

Circuit assumed that even a showing of mere negligence could support a §1983 claim. Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), reversed on other grounds sub nom, Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). See Petition for Writ of Certiorari, p. 4 and Appellants' Opening Brief below, p. 70. Accordingly, neither the jury nor the Court of Appeals was required to draw any conclusion as to the specific state of mind of the petitioners, and no inference can be drawn that the finding of liability in this case was based on "simple negligence."

More importantly, the petitioners' argument regarding the potentially broad scope of the Parrat decision and its application to bar liability in this case fails to recognize the difference between a civil rights claim such as the respondent's, which is based on the specific constitutional guarantees of the Fourth Amendment as applied to the states through the Fourteenth Amendment, and a bare

due process claim such as that advanced in Parrat. The distinction is a crucial one; indeed, it provided the starting point for this Court's analysis in Parrat:

> The only deprivation respondent alleges in his complaint is that "his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." App., at 8. As such, respondent's claims differ from the claims which were before us in Monroe v. Pape, supra, which involved violations of the Fourth Amendment, and the claims presented in Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), which involved alleged violations of the Eighth Amendment. Both of these Amendments have been held applicable to the States by virtue of the adoption of the Fourteenth Amendment.

See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2e (1962). Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment simpliciter. . . .

The Fourteenth Amendment protects only against deprivations "without due process of law." Baker v. McCollan, supra, 443 U.S. at 145, 99 S.Ct. at 2695. Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the

requirements of procedural due process.

451 U.S. at 536-537, 101 S. Ct. at 1913-1914. See Paul v. Davis, 424 U.S. 693, 700-701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976).

Ignoring the significance of this basic permise underlying the scope and application of the Parrat decision, the petitioners argue that this Court should grant review in the instant case and should interpret Parrat in such a manner as to reach the conclusion that, because the State of California provides a tort remedy for persons subjected to common-law false arrest and imprisonment, no constitutional violation of the respondent's rights occurred when the petitioners caused his unlawful arrest and detention without probable cause. It is clear that such a proposition does not warrant consideration, much less adoption, by this Court.

It was long ago settled in the seminal case of Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473,

5 L.Ed.2d 492 (1961), that the existence of a cause of action under §1983 based on an alleged violation of Fourth Amendment rights does not turn on the availability of adequate remedial procedures under state law: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183, 81 S.Ct. at 482. Moreover, the Court in Monroe recognized that a §1983 claim arising out of a Fourth Amendment violation may properly be asserted without regard to the specific intent of the defendant state official. Id. at 187, 81 S.Ct. at 494. Cf. Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).[3/]

3/ Baker held that an official's negligent failure to investigate the plaintiff's claims of misidentification following his arrest did not amount to a constitutional violation. The Court's analysis was specifically premised on the fact that the arrest was made pursuant to a valid warrant and that no Fourth Amendment issue was presented.

(cont.)

Nothing in this Court's decision in Parrat remotely suggests any divergence from either of these principles. To the contrary, Parrat's specific reliance on Monroe in reaching the conclusion that §1983 itself does not include any particular state of mind requirement, 451 U.S. at 534-535, 101 S.Ct. at 1912, and the Court's careful distinction, quoted above, of the specific Fourth Amendment claim in Monroe from the due process claim asserted in Parrat clearly acknowledge the continuing validity of the principles established in Monroe regarding Fourth Amendment §1983 actions.

The petitioners contend that, despite the fact that respondent's claim here was unquestionably

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3/ (cont.)

443 U.S. at 143-144, 99 S.Ct. at 2694. The petitioners' reliance on Baker as a "logical precusor" to the instant case (Petition for Writ of Certiorari, p. 9) is accordingly misplaced. See Powe v. City of Chicago, 664 F.2d 639, 644 (7th Cir. 1981) (where arrest is based on invalid warrant Baker does not apply to preclude liability).

based on the Fourth Amendment's specific guarantees against unlawful arrest and detention, the instant case should be governed by a different standard because, unlike the defendants' behavior in Monroe, the petitioners' conduct did not so sufficiently "shock the conscience" as to constitute a due process violation. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). Again, the petitioners fail to appreciate the distinction between those specific constitutional rights which have been wholly incorporated within the Due Process Clause of the Fourteenth Amendment and the broader, but less defined, substantive "liberty" rights which have been held to arise out of the Due Process Clause itself. See, e.g., Rochin v. California, supra (stomach-pumping of suspect); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) (excessive force by police officer); Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (assault by state official); Hall v. Tauney, 621

F.2d 607, 613 (4th Cir. 1980) (corporal punishment). See generally Baker v. McCollan, supra, Blackmun J., concurring, 443 U.S. at 147, 99 S.Ct. at 2696; Kamisar, LaFave and Israel, Modern Criminal Procedure (5th Ed. 1980), pp. 28-40.

With regard to §1983 actions based on violations of the latter kind of due process rights, an issue may arise as to whether the adequate state remedy reasoning of Parrat should be applied to bar liability for substantive "liberty" deprivations as well as property deprivations. See Rutledge v. Arizona Board of Regents, supra; Meshkov v. Abington Township, 517 F.Supp. 1280 (E.D.Pa. 1981); Howse v. DeBerry Correctional Institute, 537 F.Supp. 1177 (M.D. Tenn. 1982).[4/] With

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[4/] This Court has granted a petition for review addressing the question of Parrat's applicability in a case involving a substantive due process claim based on a state's failure to follow its own statutory election procedures. Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), cert. granted, 50 U.S. L.W. 3668 (1982).

respect to a Fourth Amendment claim such as the respondent's, however, the Parrat procedural due process analysis is simply irrelevant.

Any doubt in this matter has clearly been resolved by the Court's recent decision in Patsy v. Florida Board of Regents, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (No. 80-1874, June 21, 1982). In that case, the Court held that there is no requirement that state administrative remedies be exhausted as a precondition to an action under §1983. The specific constitutional claim involved in Patsy was that the plaintiff had been denied employment opportunities on the basis of race and sex, in violation of her right to equal protection. No mention of Parrat is made in the opinion, and the Court squarely rejected the proposition that the adequacy and appropriateness of available administrative remedies should be considered in determining whether a §1983 claim may be asserted. Id. at ___, slip opinion, p. 1. This decision conclusively establishes the

essentially limited scope of the reasoning and the holding in Parrat. In light of this development, as well as the distinguishing factors previously discussed, the petitioners' suggestion that this Court should grant review in the instant case to consider the question of Parrat's applicability is patently without merit.

II

THE PARAMOUNT ROLE OF THE JURY IN DECIDING DISPUTED QUESTIONS OF REASONABLENESS IN §1983 ACTIONS IS WELL-ESTABLISHED AND UNIFORMLY ACCEPTED BY THE FEDERAL COURTS. THE INSTRUCTIONS IN THIS CASE PROPERLY SUBMITTED SUCH QUESTIONS TO THE JURY, AND NO ISSUE MERITING REVIEW BY THIS COURT IS POSED BY THOSE INSTRUCTIONS.

The respondent's §1983 claim in the instant case was based on his warrantless arrest and detention without probable cause in violation of the Fourth Amendment. The existence of probable cause was therefore at issue as an element of the

constitutional violation underlying the respondent's civil rights action.[5/] Moreover, since this Court's decision in Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288 (1967), it has been established that a defense of "good faith and probable cause" is available to a police officer in a §1983 suit based on a claim of unlawful arrest and detention. This defense is the counterpart of the more general principle of "good faith" qualified immunity recognized by this Court in other types of §1983 cases involving various kinds of governmental officials. Procunier v. Navarette,

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5/ The jury was accordingly instructed that an individual has a constitutional right to be free from an arrest without probable cause (Petition for Certiorari, Appendix C-1) and that an arrest based on probable cause does not violate any constitutional right (Appendix C-2). Where, as in the instant case, an arrest is made without a warrant, an affirmative showing of the existence of probable cause must be made in order to justify the arrest. Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223, 12 L.Ed.2d 142 (1964); United States v. Perez-Castro, 606 F.2d 251, 253 (9th Cir. 1979). See Gilker v. Baker, 576 F.2d 245, 246 (9th Cir. 1978); Martin v. Duffie, 463 F.2d 464, 469 (10th Cir. 1972).

434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed. 2d 24 (1978); Gilker v. Baker, 576 F.2d 245, 247 (9th Cir. 1978). See Glasson v. City of Louisville, 518 F.2d 899, 907-908 (6th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975). The petitioners in this case asserted such a defense, thereby further placing in issue the question of probable cause.

The concept of constitutional probable cause is grounded in principles of reasonableness and prudence:

> 'Probable cause' for a warrantless arrest exists where facts known to the officers or about which they have reliable information are sufficient in themselves to warrant a man of reasonable prudence and caution in believing that a crime has been or is being committed by the person to be arrested. Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302 (1949); Carroll v.

United States, 267 U.S. 132, 162, 45 S.Ct. 280 (1925) . . .

Linn v. Garcia, 531 F.2d 855, 861 (8th Cir. 1976). See, Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225 L.Ed.2d 142 (1964). Where the probable cause issue arises in the context of a "good faith" defense to §1983 liability, objective reasonableness again provides the controlling standard. Pierson v. Ray, supra, 386 U.S. at 557, 87 S.Ct. at 1219; Gilker v. Baker, supra. Application of this standard necessarily requires an evaluation of all the facts and circumstances surrounding an arrest and a judgment as to the reasonableness of police conduct in light of those facts. See Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); Scheuer v. Rhodes, 416 U.S. 232, 247-248, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974).[6/]

[6/] The petitioners suggest that some confusion exists as to the proper relationship of the issues of probable cause and qualified good faith (cont.)

Because of the nature of such an inquiry, it has consistently and uniformly been recognized that the issue of probable cause in a §1983 action is a matter to be resolved by the jury unless the facts, and the inferences to be drawn from the facts, are not disputed. As stated by the Court of Appeals for the Ninth Circuit:

6/ (cont.)

immunity in Fourth Amendment §1983 actions and that the Court should grant review in this case to clarify the difference between these issues. In fact, however, no such confusion appears in the case law. The two matters are certainly intertwined, as is indicated by the fact that the defense recognized in Pierson is characterized as one of "good faith and probable cause." 386 U.S. at 557, 87 S.Ct. at 1219. However, the courts have had no difficulty in appreciating the distinction that, even if as a matter of law constitutional probable cause did not exist so as to justify an arrest, a defendant may still avoid liability if he reasonably believed that the arrest was lawful. See e.g., Jaroslawicz v. Seedman, 528 F.2d 727, 732 (2d Cir. 1975); Boscarino v. Nelson, 518 F.2d 879, 882 (7th Cir. 1975); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand); as well as the Court of Appeals decision in the instant case (Petition for Certiorari, Appendix A-9).

> A determination of probable cause involves the weighing of many factors. When, as here, reasonable persons might reach different conclusions about the facts, the establishment of those facts is for the jury, and the existence of probable cause is likewise for the jury, upon a proper instruction about the law.

Gilker v. Baker, supra, 576 F.2d at 247. Accord, Nix v. Sweeney, 573 F.2d 998 (8th Cir. 1978), cert. denied, 444 U.S. 929, 100 S.Ct. 271, 62 L.Ed.2d 186 (1979); Linn v. Garcia, 531 F.2d 855, 861 (8th Cir. 1976); Draeger v. Grand Central, Inc., 504 F.2d 142, 144 (10th Cir. 1974); Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir. 1970), cert. denied, 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed. 2d 709 (1971); Beauregard v. Wingard, 362 F.2d 901, 903 (9th Cir. 1966). See Banish v. Locks, 414 F.2d 638, 641 (7th Cir. 1969).

Pursuant to this well-settled rule, the district court in the instant case submitted the

question of probable cause to the jury, instructing them as to the definition and meaning of that concept. (Petition for Certiorari, Appendix C-3). The jury was further instructed that an arrest based on probable cause was not unlawful and that the defendants could not be found liable if they reasonably believed, under all the circumstances, that their conduct was lawful. (Appendix C-2, C-3). The petitioners here argue that the Court should grant review in this case and hold that the instructions to the jury were erroneous because they did not limit the jury's role to the simple resolution of factual disputes and reserve to the court the ultimate conclusion as to what facts would legally establish probable cause. It is respectfully submitted that this suggestion is plainly without merit.

The essential premise of the petitioners' argument is that the probable cause issue should properly be decided by the court as a matter of law rather than by "the arbitrament of a jury."

Ball v. Rawles, 93 Cal. 222, 228-229 (1892). (Petition for Certiorari, p. 22). This proposition, however, is flatly contrary to the settled law that the issue of probable cause in a §1983 action must be submitted to the jury whenever the facts are disputed or are subject to different inferences or conclusions. See Gilker v. Baker and other cases cited, supra.

The petitioners' further contention that the jury in a civil rights action must be provided with an instruction setting forth the specific facts which, if true, would justify the arrest and directing that a finding of probable cause be made on that basis is equally unworthy of this Court's consideration. The petitioners rely on extensive citations to cases and authorities involving the common-law torts of false arrest and malicious prosecution. Their view of the limited role of the jury in such actions is based on strict principles of common law pleading and proof which severely restrict a plaintiff's right to recovery on such theories. See, e.g.,

Ball v. Rawles, supra, 93 Cal. at 229-230. Insofar as they might act to unduly burden or restrain a plaintiff, such principles are not appropriately applied in a §1983 case where remedies must be liberally construed and immunity from liability limited. Gomez v. Toledo, 446 U.S. 635, 638-639, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). Certainly, nothing in the decision of this Court or in the decisions of the lower courts holding that probable cause is a jury question in a federal civil rights action suggest that the jury's consideration of the issue is to be so circumscribed or that such a detailed and restrictive instruction is required. 7/

7/ Contrary to the petitioners' suggestion, the Courts of Appeals are not divided in their treatment of probable cause as a jury issue in §1983 actions. Banish v. Locks, 414 F. 2d 638, 641-642 (7th Cir. 1969), cited by the petitioners as an example of a probable cause determination "employing the enumeration of specific information the existence of which would establish probable cause" (Petition for Certiorari, p. 24), was a case in which the court decided probable cause on undisputed facts and wrote a memorandum of decision articulating the more important (cont.)

Moreover, an instruction directing the jury that it must find probable cause on the basis of specific facts would clearly have been inappropriate in the instant case. The central dispute at trial was not whether the petitioners did or did not possess specific items of factual information but rather whether the inferences and conclusions which they drew from those facts were reasonable under all the circumstances. This is precisely the kind of dispute contemplated by the federal courts when they have consistently recognized that the question of probable cause in a §1983 case should be decided by the jury in light of all the facts, applying ordinary principles of reasonableness and

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7/ (cont.)

factual bases for its conclusions. No question of jury instructions was addressed or considered in the case. The other two cases cited by petitioners to suggest some differing approach among the circuits clearly involved common-law tort actions rather than federal civil rights claims. Nesmith v. Alford, 318 F.2d 110, 123 (5th Cir. 1963); Montgomery Ward Inc. v. Freeman, 199 F.2d 720, 724 (4th Cir. 1952).

prudence. See, Gilker v. Baker, supra, 576 F.2d at 247; Nix v. Sweeney, supra, 573 F.2d at 1002; Giordano v. Lee, supra, 434 F.2d at 1231.[8/] It is therefore respectfully submitted that the petitioners' request for review on this issue should be rejected.

8/ The probable cause instruction proposed by the petitioners in the trial court (Petition for Certiorari, pp. 18-19) demonstrates how inapplicable their argument is to the present case. The instruction listed five specific items of information, the first being that the respondent was seen leaving a restaurant with the murder victim, and the other four relating to the time of the victim's death. The instruction was properly rejected because, even viewed in isolation, the listed items would not amount to probable cause. Even more importantly, the real issues of fact regarding probable cause which were raised at the trial were in no way addressed by the proposed instruction because it did not allow for the jury's consideration of the reasonableness of the petitioners' conclusions as to matters such as time of death or the respondent's involvement in the crime in light of the many other facts known to them.

III

THE STANDARDS FOR DETERMINING THE PROPRIETY OF A REMAND FOR PARTIAL RETRIAL ARE WELL-SETTLED, AND NO SIGNIFICANT QUESTION REGARDING THEIR APPLICATION IS RAISED BY THIS CASE

In Gasoline Products Company v. Champlin Refinery Co., 283 U.S. 494, 51 S.Ct. 513, 75 L. Ed. 1188 (1931), this Court held that where an appellate court finds error to have affected a single issue at trial, the court has the discretion to remand the cause for a new trial limited in scope to that one issue. See also Fed. R. Civ. P. 59(a). Subsequent to the decision in Gasoline Products, the federal appellate courts have exercised this discretion in a consistent and evenhanded manner by applying, on a case by case basis, the principles enunciated in that case. As developed by the courts, the well-established test for the propriety of a limited remand involves an analysis of the following factors: (1) is the issue to be retried

separable and distinct from the other issues in the case; (2) did the error below affect the determination of any other issues; and (3) would a partial new trial cause injustice or create confusion and uncertainty. See 6A Moore's Federal Practice §59.06 (2d ed. 1976); 11 Wright & Miller, Federal Parctice and Procedure §2814 (1973); and the numerous cases cited therein.

Contrary to the petitioners' assertions, these principles and their application have not received disparate treatment by the various federal circuits. Each of the cases cited by the petitioners, while reaching different results based on the particular facts and circumstances involved, applies the same basic standards and analysis. See, e.g., Lies v. Farrel Lines, Inc. 641 F.2d 765, 775-776 (9th Cir. 1981); Bosse v. Litton Unit Handling Systems, 646 F.2d 689, 694 (1st Cir. 1981); Vizzini v. Ford Motor Co., 569 F.2d 754, 760-761 (5th Cir. 1977); Williams v. Slade, 431 F.2d 605, 608-609 (5th Cir. 1970). The suggestion that the Fifth Circuit has,

in effect, adopted a test which precludes a partial remand on the issue of damages whenever questions of causation are involved in the reversal is not supported by case law. See Nat Harrison Associates, Inc. v. Gulf States Utilities Co., 491 F.2d 578, 588 (5th Cir. 1974) in which the court ordered a limited retrial where the reversal was based in part on defects regarding proof of causation in the calculation of damages. Cf. Fury Imports v. Shakespeare Co., 554 F.2d 1376, 1387-1388 (5th Cir. 1977).

Moreover, even assuming that such a test had been adopted in some circuits but not in others, the instant case would not present a substantial issue regarding the application of that standard. In finding petitioners liable for damages to the respondent, the jury below necessarily made the factual determinations that (1) the petitioners caused Smiddy to be deprived of his constitutional right to be free from arrest and detention not based upon probable cause, and (2) Smiddy suffered damages as a result of that deprivation.

The Ninth Circuit affirmed the jury's factual determination of petitioners' liability, including the finding of causation. The judgment against the petitioners was reversed only to the extent that it presumably included damages suffered after the filing of the criminal complaint. The court's limited remand for determination of the amount of damages attributable to the period prior to the filing of the charge in no way implicates or disturbs the jury's findings on the basic questions of causation which were implicit in the verdict of liability. 9/

9/ Of course, the task of apportioning the respondent's damages may involve some determination of questions in the nature of causation, and the opinion of the Court of Appeals describes the remand as requiring a consideration of "proximate causation." (Appendix A to Petition for Certiorari, p. A-13). Compare the characterization of this issue by Prosser:

> Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but (cont.)

Under these circumstances, it is clear that the remand for a partial retrial in this case was appropriate under any reasonable interpretation or application of Gasoline Products Company, supra. It is therefore respectfully submitted that the petitioners' request for review of this issue should be denied.

9/ (cont.)

> of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes.

Prosser, Law of Torts (4th Ed. 1971) p. 313. Regardless of how the question of apportionment is framed, however, it is certainly "clearly separable" from the issue of liability. Gasoline Products Company v. Champlin Refining Co., 283 U.S. 494, 499, 51 S.Ct. 513, 514, 75 L.Ed. 1188 (1931).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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Respectfully submitted,

ROBERT M. TALCOTT
TALCOTT, VANDEVELDE
& WOEHRLE

Counsel of Record for
Respondent

JOHN H. BISBEE
BISBEE & NAGAN

Counsel for Respondent